

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3 WOLFRAM ARNOLD, ERIK)
4 FROESE, TRACY HAWKINS,)
5 JOSEPH KILLIAN, LAURA CHAN)
6 PYTLARZ and ANDREW)
7 SCHLAIKJER,)
8 Plaintiffs,) C.A. No. 1:23-cv-00528-TMH
9 v.)
10 X CORP. F/K/A TWITTER,)
11 INC., X HOLDINGS CORP. F/K/A)
12 X HOLDINGS I, INC. and ELON)
13 MUSK,)
14 Defendants.)

15 EMMANUEL CORNET, JUSTINE DE)
16 CAIRES, GRAE KINDEL, ALEXIS)
17 CAMACHO, JESSICA PAN, EMILY)
18 KIM, MIGUEL ANDRES BARRETO,)
19 and BRETT MENZIES FOLKINS,)
20 Plaintiffs,) C.A. No. . 1:23-cv-441-TMH
21 v.)
22 TWITTER, INC.,)
23 Defendant.)

24 Tuesday, April 15, 2025
1:32 p.m.
Oral Argument

1 844 King Street
2 Wilmington, Delaware

3 BEFORE: THE HONORABLE TODD M. HUGHES
4 United States District Court Judge

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6 APPEARANCES:

7
8 KATE BUTLER LAW LLC
9 BY: KATHERINE BUTLER, ESQ.

10 -and-

11
12 LICHTEN & LISS-RIORDAN, P.C.
13 BY: BRADLEY MANEWITH, ESQ.

14 Counsel for the Plaintiffs Emmanuel Cornet,
15 Justine De Caires, Grae Kindel, Alexis Camacho,
16 Jessica Pan, Emily Kim, Miguel Andres Barreto,
17 and Brett Menzies Folkins

18 CHRISTENSEN LAW LLC
19 BY: JOSEPH L. CHRISTENSEN, ESQ.

20 -and-

21 KAMERMAN, UNCYK, SONIKER & KLEIN P.C.
22 BY: AKIVA COHEN, ESQ.

23 Counsel for the Plaintiffs Wolfram
24 Arnold, Erik Froese, Tracy Hawkins, Joseph
25 Killian, Laura Chan Pytlarz, and Andrew
 Schlaikjer

1 APPEARANCES:

2
3
4 BALLARD SPAHR
5 BY: BETH MOSKOW-SCHNOLL, ESQ.
6 Counsel for the Press Coalition
78 MORGAN LEWIS & BOCKIUS, LLP
9 BY: JODY BARILLARE, , ESQ.
10 T. CULLEN WALLACE, ESQ.

11 -and-

12 ASHBY & GEDDES
13 BY: BRIAN BIGGS, ESQ.

14 -and-

15 WILLENKEN LLP
16 BY: KENNETH TRUJILLO-JAMISON, ESQ.17
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21 Counsel for the Defendants
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P R O C E E D I N G S

(Proceedings commenced in the courtroom beginning at
1:32 p.m.)

1 **THE COURT:** Good afternoon again. Please be
2 seated.

3 Okay. We've got a couple of different things
4 to get through today, so I'm just going to take them in
5 order. I will assume that whoever needs to get up, feel
6 free. I want to deal with the sealed documents first.

7 And so I don't -- why don't the plaintiffs'
8 lawyers get up first and tell me what's the relevance of
9 these arbitration awards and why they need to stay in the
10 record and what your position is on sealing.

11 **MR. MANEWITH:** Which, Your Honor, just to be
12 clear --

13 **THE COURT:** Are you the press?

14 **MR. MANEWITH:** No, I'm plaintiffs' lawyer --

15 **MS. MOSKOW-SCHNOLL:** I am.

16 **MR. MANEWITH:** -- for Cornet.

17 **THE COURT:** Sorry. Cornet.

18 I want Cornet first, then Arnold.

19 **MR. MANEWITH:** That's why I came up here.

20 **THE COURT:** Well, they're different documents,
21 and I think they may be different. So you're the Cornet
22 plaintiffs?

23 **MR. MANEWITH:** Yes.

24 **THE COURT:** Okay. We'll get to you.

25 **MS. MOSKOW-SCHNOLL:** And, Your Honor, I

1 represent the Press Coalition.

2 **THE COURT:** Okay. Well, he goes first. I'll
3 let them go first and then -- because your position may
4 become modified as we go through the argument.

5 **MS. MOSKOW-SCHNOLL:** Okay. Thank you, Your
6 Honor.

7 **THE COURT:** You'll see.

8 **MS. BUTLER:** Good afternoon, Your Honor.

9 Kate Butler, on behalf of the Cornet
10 plaintiffs. I rise to introduce Brad Manewith, who will
11 be taking the arguments.

12 Thank you.

13 **THE COURT:** Okay. Thank you.

14 Do you all want to introduce your counsel? Can
15 we do all this introduction first before we get into the
16 arguments? Because, if you've seen, I don't sit here and
17 listen, I question. So I'd rather just get the
18 introductions done, and let's move forward.

19 **MR. CHRISTENSEN:** Good morning, Your Honor.

20 Joe Christensen, from Christensen Law, on
21 behalf of the plaintiffs in the Arnold case.

22 And with me, is my cocounsel, Akiva Cohen at
23 Kamerman Uncyk. He will be making the argument today.

24 Thank you.

25 **MR. BIGGS:** Good afternoon, Your Honor.

1 Brian Biggs from Ashby & Geddes. I represent
2 Defendant in the Cornet case, but with respect to the
3 motion to intervene only.

4 With me is Kenneth Trujillo-Jamison from
5 Willenken LLP, and he'll be speaking on behalf on the
6 motion to intervene.

7 **THE COURT:** Okay.

8 **MR. BARILLARE:** Good afternoon, Your Honor.

9 Jody Barillare from Morgan Lewis, on behalf of
10 the defendants in Arnold and Cornet.

11 With me today is my colleague, Cullen Wallace,
12 who will be taking the lead for defendants.

13 **THE COURT:** Okay. Thanks.

14 **MR. BARILLARE:** Thank you, Your Honor.

15 **THE COURT:** And then, the people -- the press
16 entities have a local counsel to introduce or...

17 **MS. MOSKOW-SCHNOLL:** I am both local and
18 regular.

19 **THE COURT:** Okay.

20 **MS. MOSKOW-SCHNOLL:** Beth Moskow-Schnoll, on
21 behalf of -- do you want me to read out all my clients?

22 **THE COURT:** No, no, no.

23 **MS. MOSKOW-SCHNOLL:** No?

24 **THE COURT:** You're representing all the --

25 **MS. MOSKOW-SCHNOLL:** All the press.

1 **THE COURT:** -- intervenors from the press.

2 **MS. MOSKOW-SCHNOLL:** Your Honor, I did have a
3 question, though. We filed a motion to join in for NPR,
4 and I don't think the Court has ruled on that, but --

5 **THE COURT:** Okay.

6 **MS. MOSKOW-SCHNOLL:** -- we do represent them as
7 well.

8 **THE COURT:** Okay. We will get it on the
9 docket. It's granted on that, too.

10 **MS. MOSKOW-SCHNOLL:** Okay. Thank you.

11 **THE COURT:** Not to intervene, just to
12 represent.

13 **MS. MOSKOW-SCHNOLL:** Right.

14 **THE COURT:** Yeah. Okay. So now, that we've
15 got that out of the way.

16 Cornet plaintiffs, why are these -- I know you
17 keep filing a ton of them. I think I asked last time
18 around why they're relevant and why they should stay in
19 the record. I have that same question because I, frankly,
20 failed to understand the relevance to me.

21 **MR. MANEWITH:** Sure, Your Honor.

22 Bradley Manewith, on behalf of the Cornet
23 plaintiffs.

24 And they are relevant because they address the
25 same issues that are issue in the Cornet case. Namely,

1 whether or not there's third-party beneficiary status or
2 breach of contract for the direct. And so their
3 persuasive authority --

4 **THE COURT:** Right. So those are all legal
5 questions, right?

6 **MR. MANEWITH:** Correct.

7 **THE COURT:** And I, obviously, owe no deference
8 to the arbitration awards. You are citing them as
9 persuasive authority?

10 **MR. MANEWITH:** They are persuasive authority
11 just the same as in the Cornet case. The Arnold report
12 recommendation would be potentially persuasive authority.
13 We understand you can give them as much weight or as
14 little weight as you see fit.

15 **THE COURT:** And what discretion do you think I
16 have with regard -- can I just strike them if I don't, if
17 I'm not going to read them and use them as persuasive
18 authority?

19 **MR. MANEWITH:** Well, I would say, no, Your
20 Honor, that you cannot just strike them. We understand
21 that you may give them no authority, but to the extent
22 that we need to have a record on appeal going forward,
23 they are potentially, you know, persuasive to another
24 Court.

25 And so we do believe they are appropriately

1 before you.

2 **THE COURT:** Well, if I strike them, they're
3 still a part of the record, you can just argue that they
4 were improperly stricken.

5 **MR. MANEWITH:** We would still say that they
6 should not be stricken.

7 **THE COURT:** I understand. But I just want to
8 know, that's in my discretion, right?

9 You would have to argue abuse of discretion if
10 I don't find them -- if I don't find individual
11 arbitration awards in private cases to be at all
12 persuasive. They are not another judge's ruling. If they
13 were other judge's rulings and the like, I wouldn't need
14 them to be on the record. They would be citeable as
15 precedent.

16 **MR. MANEWITH:** Oh, we would say that they're no
17 different, though, than an administrative hearing.

18 If we were, for example, in a discrimination
19 case, and there was a ruling from the EEOC in an
20 administrative hearing, NLRB, again, they are authority,
21 which we can cite to. They're appropriately before you.
22 They are clearly, in our minds, relevant to the issues to
23 see how other judicial officers or other officers would
24 decide the issues.

25 **THE COURT:** Okay. So here's the problem. I am

1 not going to keep things in the record under seal. So
2 these stay in. They are coming -- the seal is coming off
3 with appropriate redactions, which I know that X objects
4 to, and I fail to see why I should keep them on the record
5 when I don't find them of any relevance to me whatsoever.

6 **MR. MANEWITH:** Well, again --

7 **THE COURT:** What's your position, though? I
8 think you said in your papers that you don't object to
9 keeping them sealed. You know, maybe I'm sitting at this,
10 looking at this from a different perspective because of
11 where I come from.

12 Appellate courts hate having sealed documents
13 in the record. And I generally think that should be true
14 for trial courts, too, that if it's in the record, it is
15 going to be relied upon by the Court. It should be open
16 to the public, absent national security information,
17 confidential business information, or personally
18 identifying information.

19 I think the first is obviously not there. The
20 second, to the extent it's there, can be redacted.

21 So what's your position, if I keep them, on
22 whether they should be at least partially unsealed?

23 **MR. MANEWITH:** Our position is that we take no
24 strong position that they shouldn't be unsealed. Our only
25 request is that they have the redactions for the personal

1 identifying. That's all.

2 **THE COURT:** Okay. Let me hear from them.

3 And this is just with the Cornet ones, because
4 I find a substantive difference with the Arnold
5 declaration, or the Arnold award, and we'll talk about
6 that separately.

7 **MR. WALLACE:** Understood. Thank you, Your
8 Honor.

9 I don't disagree with your assessment that
10 those continued filings of these arbitration awards are
11 not relevant, especially in the context we're talking
12 about here, which is motion to dismiss under Rule
13 12(b) (6). They're not cited in the complaint. No one is
14 seeking to ask the Court take judicial notice of them.

15 I think it is a stark contrast between these
16 awards and the continual references to Judge Burke's
17 Report and Recommendation, which was on the same issues or
18 similar issues at the 12(b) (6) stage, so a wholly
19 different situation.

20 The Court has inherent powers, as we explained
21 in our brief, to strike these improvident and irrelevant
22 arbitration awards off of its docket.

23 I think what's become readily apparent,
24 following the hearing we had back in January when I raised
25 the issue about the continual filing of these, and it was

1 discussed that they were under seal, therefore, there was
2 no harm. The media comes out of the woodwork now, and now
3 they want to unseal them and see everything to do with
4 them.

5 So our position, obviously, is they are
6 irrelevant. They are being submitted in the context in
7 violation of the local rules, as improper sur-replies.
8 They're confidential to the parties' agreement. So we
9 would respectfully request they be struck.

10 Alternatively, as Your Honor alluded to, if
11 they do -- if they are unsealed for any reason, we would
12 ask that all personal identifying information, including
13 information regarding people's salary, the way that any
14 damages were calculated, the amount of any damages, and
15 all that information be stricken from the record, and that
16 there be an order issued that people who seek leave to
17 file these irrelevant documents or that people not file
18 them anymore, absent some form of leave going forward to
19 control this, so we're not here again.

20 Alternatively, we're just going to continue to
21 see them, then we're going to be compelled to file them --

22 **THE COURT:** We're solving this today.

23 **MR. WALLACE:** Understood, Your Honor.

24 **THE COURT:** After I make my decision and issue
25 the order, so maybe not exactly today, but shortly.

1 If I decide that they have some minimal
2 relevance, I'm going to keep them on the record. So I
3 understand you think they should stay under seal
4 altogether.

5 But do you have any authority for the notion
6 that just because they're agreed to be confidential under
7 the arbitration agreement, that I have to keep them
8 entirely confidential, or do you think I have discretion
9 to unseal them and remove all the stuff you just said,
10 which I think I would agree with anything -- like that
11 seems like it would have to be redacted.

12 **MR. WALLACE:** Okay. Then, Your Honor, as much
13 as I like the answer to be that there's something other
14 than that, I think you have in inherent discretion to
15 control your docket, control the parties' conduct.

16 So, clearly, I think you have the power to do
17 as you see fit in that regard within the confines of the
18 parameters you discussed.

19 **THE COURT:** Okay. Do you have the -- wait, do
20 you have something?

21 **MR. MANEWITH:** So that would be -- yeah.

22 **MR. TRUJILLO-JAMISON:** So might I briefly on
23 the Press Coalition motion --

24 **THE COURT:** Okay. We're still talking about
25 this. I think I'm trying to get through all the stuff

1 with the parties, so I can ask the press a more directed
2 question because I think they, you know, may have
3 different responses depending on that.

4 Do you also represent X for the Arnold cases?

5 **MR. TRUJILLO-JAMISON:** Yes, Your Honor. I
6 represent X with respect to the Arnold cases and the
7 Cornet cases, but when it comes to the press, we have
8 conflict of interest. And so whatever the press arguments
9 are, are kind of --

10 **THE COURT:** This is going to be a little loose.
11 I will give you a chance to argue on opposing their
12 motions to intervene, but I'm trying, really, to get to
13 the sealing, not the motion to intervene.

14 So the Arnold declaration -- or not
15 declaration -- the Arnold award is different. And it's
16 still under seal, I think, so I'm not going to go --
17 right?

18 You filed an arbitral award in Arnold
19 relating to a discovery issue, not these other ones,
20 right?

21 **MR. WALLACE:** In Arnold, I believe the posture
22 of Arnold, and I -- there's a lot of items --

23 **THE COURT:** I have an arbitration award that
24 was filed before me in Arnold that purports to talk
25 about -- I don't know what I can say, but rules regarding

1 a deposition.

2 Do you understand what I'm talking about?

3 I read this. It's on the docket in Arnold. So
4 I didn't admit -- I'm not AI. I don't hallucinate
5 answers. Maybe I do, but just not in the way AI does.

6 Look, somebody filed in Arnold, I assume it was
7 from X, an arbitration award that set forth an
8 understanding of how this discovery would proceed with
9 regard to Mr. Musk. That is a different kind of award
10 than -- I think is set to be used. Maybe you didn't file
11 it as part of an official filing. Maybe you attached it
12 to one of your discovery letters, because I understand
13 there's a discovery dispute brewing on that issue.

14 To the extent you want me to rely on that
15 arbitration award as reflecting an agreement of the
16 parties as to how discovery would proceed with regard to
17 that topic, that award is going to be unsealed because I
18 will have to rely on it. And so I wanted to touch on
19 that, too, even though it is not specifically the Cornet
20 ones.

21 **MR. WALLACE:** And I'm, admittedly, Your Honor,
22 not as up-to-speed with that. I was more familiar with
23 the amicus brief that was filed, but I wasn't involved in.

24 **THE COURT:** Who filed that?

25 **MR. WALLACE:** The Cornet plaintiffs filed an

1 amicus.

2 **THE COURT:** No, no. I understand. I'm talking
3 about in Arnold. Somebody filed something in Arnold.

4 **MR. WALLACE:** Okay. That would be us, I
5 suppose. That would be the defendants.

6 **THE COURT:** Okay.

7 So I guess I'm going to have to speak
8 hypothetically, or maybe we'll take a break, and you two
9 can talk about it, so you can figure out what I'm talking
10 about.

11 Let's just stick with the Cornet awards for
12 now. I think I understand your position.

13 Do you want to --

14 **MR. COHEN:** Just very briefly, Your Honor.

15 **THE COURT:** You're the Arnold.

16 **MR. COHEN:** I am. Akiva Cohen from Kusk. I am
17 the attorney for the Arnold plaintiffs.

18 The Cornet plaintiffs filed an amicus brief
19 that included these arbitration awards.

20 I'm in a little bit of a compromised position
21 because, though the rules for this district say sealed
22 filings should be provided to me, I haven't seen them. So
23 that's a problem.

24 **THE COURT:** Are these all the ones from Cornet?

25 **MR. COHEN:** These are all the ones from Cornet.

1 **THE COURT:** Okay. Then you should get them if
2 they want to try to get them in your case's amicus. I
3 don't think I granted that, right?

4 **MR. MANEWITH:** That was stricken already.

5 **THE COURT:** What?

6 **MR. MANEWITH:** That was stricken already, Your
7 Honor, so they're out.

8 **THE COURT:** Oh, okay. Oh, so those are out.

9 **MR. MANEWITH:** Those are out, the ones --

10 **THE COURT:** I thought I was denying -- I
11 thought I denied your ability to participate as an
12 amicus --

13 **MR. MANEWITH:** In Arnold.

14 **THE COURT:** -- in Arnold last time.

15 Okay. So you don't need to see them. They're
16 not in.

17 **MR. COHEN:** Okay. Good. And then --

18 **THE COURT:** The Arnold one I'm talking about,
19 you're aware of.

20 **MR. COHEN:** Yes. So that was the discovery
21 panel ruling on a discovery dispute.

22 **THE COURT:** So let me ask you: Do you think
23 that is relevant to any discovery dispute we are going to
24 have here?

25 I mean, you may not agree that it's binding on

1 me, but do you think it's something I need to look at?

2 **MR. COHEN:** I think it is something that they
3 intend to make arguments on the basis of.

4 **THE COURT:** Okay.

5 **MR. COHEN:** And, therefore, it has to come in
6 the same way. Frankly, anything that somebody wants to
7 make an argument on the basis of, whether you ultimately
8 think that that's persuasive or not, really doesn't, in my
9 view, bear on whether or not it has to stay on the docket.

10 If somebody is making an argument based on it,
11 it has to stay on the docket. They are making an argument
12 based on it; therefore, it has to stay on the docket.

13 **THE COURT:** And do you have a position on
14 whether it should stay sealed or not?

15 **MR. COHEN:** So, in my view, private agreements
16 by the parties have absolutely no power within the Court's
17 sealing authority to seal a document on the record in a
18 court case. It has to have good cause independent of any
19 private agreement by the parties.

20 So if there's good cause for particular items
21 within that agreement, in that decision, I don't think
22 there is by the way, then it should be sealed. And if
23 there isn't, then it shouldn't be.

24 And that goes for the arbitration awards, that
25 goes for every single one of these documents. There has

1 to be independent good cause to seal independent of any
2 private agreement.

3 **THE COURT:** Okay. Thank you. And the -- wait,
4 who are you?

5 **MR. MANEWITH:** Cornet plaintiff.

6 **THE COURT:** Okay. What do you want to say?

7 **MR. MANEWITH:** Just, if I may, quickly respond
8 to a few things that are raised by X Corp.

9 Again, we believe that the arbitration awards
10 are persuasive authority. As Your Honor noted, they are
11 legal arguments. There's legal analysis of the
12 third-party beneficiary that is directly on point for Your
13 Honor.

14 **THE COURT:** Okay.

15 **MR. MANEWITH:** With respect to confidentiality,
16 and the question about confidentiality, I would just note
17 that we find it somewhat hypocritical, I guess, that X
18 Corp. is claiming confidentiality -- is a breach of the
19 confidentiality provisions of the arbitration agreement in
20 opposing our use of them considering that, as we've
21 pointed out, X Corp., in and of itself, has used the
22 decisions of arbitrators in one case to another to another
23 in a discovery dispute.

24 Over 20-plus times they've cited to, you know,
25 different arbitrators' decisions before other arbitrators.

1 They were the first party to actually file a NOSA
2 regarding one of the arbitration awards. And as it deals
3 with the Arnold case, they're sharing depositions and
4 other materials from our cases -- our clients' cases
5 without even notifying us.

6 And so, to the extent that they're claiming
7 that there is this order from an arbitrator on
8 confidentiality, we weren't even given notice. We weren't
9 provided that. We weren't able to intervene.

10 So it's clearly the parties' agreement
11 encompasses the use of these materials across all of our
12 cases.

13 **THE COURT:** Okay. Thanks.

14 Can I hear from the lawyer for the press.

15 And, really, I just have a question.

16 If I strike all the declarations in the
17 Cornet -- I keep saying "declarations" -- all the awards
18 in the Cornet case from the record because I do not find
19 them relevant, and I conclude that they were improperly
20 filed, and they're not part of the record, does that moot
21 your motion?

22 **MS. MOSKOW-SCHNOLL:** No. I mean, Your Honor,
23 we would argue that you can't put the genie back in the
24 bottle.

25 **THE COURT:** Okay.

1 MS. MOSKOW-SCHNOLL: I mean, they've been --

2 THE COURT: But I don't agree with that. So if
3 I strike them from the record, then there's no -- they're
4 not part of the record anymore, you don't have access to
5 them.

6 Because I do agree. If they say on the record,
7 at least part of them is being made public, I don't even
8 know if I have to grant your motion to intervene. If I
9 make them public, you can just go on the docket and get
10 them.

11 I'm not going to -- it's one or the other.
12 Either they stay on the docket and they're properly
13 redacted and made public, or they're stricken. I have,
14 from the start, not found these arbitration awards on the
15 issues before me on the motion to dismiss relevant in any
16 way whatsoever.

17 And I expressed that at the last hearing on
18 this case. They keep coming in. I didn't ban you from
19 doing it, but I'm not going to read them. I am not going
20 to read them. And if I'm not going to read them, they're
21 not relevant.

22 You can preserve an objection on the record to
23 that position, and, on appeal, if you want to say that I
24 abused my discretion in not reading and not looking at
25 private arbitration awards to determine whether your

1 complaint states a claim on the legal grounds in this
2 court, then you can preserve that objection.

3 But I'm not going to rely on them, I'm not
4 going to look at them. And so, if they're not properly
5 part of the record, then I don't see any reason for the
6 press to get ahold of private arbitration awards.

7 That is in the Cornet case. I know you didn't
8 move to intervene in the Arnold case, I don't really think
9 you need to move to intervene there.

10 We're going to talk about that a little bit
11 later. More -- maybe you need a small break to go look
12 into that. The one filed there, which you may not even
13 know about, but you've heard today, seems to be something
14 that suggests ground rules for discovery, that one party
15 is going to want me to hold to, and the other one is not.

16 And if I have to review that to reach a
17 decision on the discovery dispute, then that's going to be
18 in the record, and you will get access to that.

19 **MS. MOSKOW-SCHNOLL:** Your Honor, I just want to
20 make the point, though, that once -- the Third Circuit
21 authority is pretty clear that once something is actually
22 filed on the docket, it becomes a judicial record, and
23 then the presumption applies that there should be free
24 access to that document.

25 **THE COURT:** I understand your position, but if

1 I view that those documents were improperly filed on the
2 record and should never have been filed, and that because
3 they are private arbitration agreements, there is an
4 interest in not releasing them, you know, you can take
5 that up, too.

6 **MS. MOSKOW-SCHNOLL:** Well, but --

7 **THE COURT:** You can take all this up. I'm not
8 going to give these -- the bottom line is, these
9 arbitration awards in the Cornet case are almost -- I'm
10 not ruling from the bench, but I am essentially ruling
11 from the bench. I will write a small order.

12 I'm going to strike them from the record as
13 being improperly filed, as not being relevant, and,
14 therefore, they're going to be removed from the docket.
15 And I will deny your motion to intervene as moot, most
16 likely, because I don't think you have the entitlement to
17 documents that should never have been made part of the
18 public record.

19 I understand your point, that once they're
20 there, you should get them.

21 **MS. MOSKOW-SCHNOLL:** And they have been there
22 for a long time. I mean, the first one was filed in
23 November of 2024. So they have been on the docket for
24 months and months now.

25 **THE COURT:** Well, they haven't been there --

1 maybe you think that's a long time.

2 I move in the appellate world. November '24 to
3 April of '25 is a very short period of time. And so I
4 don't think they have been there on the docket all that
5 long.

6 But do you have anything else you want to say?

7 I read your papers. If these documents were going to stay
8 on the record, I agree with you entirely, you get access
9 to them. But I don't think they're relevant, and I don't
10 think they belong in the case, and so I'm not going to
11 give you access to documents that I think are irrelevant.

12 **MS. MOSKOW-SCHNOLL:** So you're using the
13 relevance argument as far as the motion to strike, right?
14 Because relevance is really not an issue as far as whether
15 or not something is a judicial record.

16 **THE COURT:** Right.

17 **MS. MOSKOW-SCHNOLL:** Okay. I just wanted to
18 make that clear.

19 **THE COURT:** No, no. I just don't think the
20 relevance goes to your argument. I just think that if
21 they're not actually part of the record, then you have no
22 right to access them.

23 I understand your point that you can't pull
24 back access by removing them. I don't necessarily agree
25 with that. I think I have a good reason to do that.

1 Do you have anything else?

2 **MS. MOSKOW-SCHNOLL:** Yeah. I mean, just the
3 reason that the press wants access to these is because
4 they are relevant to current events, and the Court -- even
5 if you are determining that you want to strike them, I
6 mean, they're relevant for the purpose of people being
7 able to see, well, what did they say? Why does the Court
8 deem them not to be relevant? It's all part of that whole
9 Sunshine.

10 **THE COURT:** Okay.

11 **MS. MOSKOW-SCHNOLL:** Letting everybody see
12 what's going on in the case.

13 **THE COURT:** Okay. I understand.

14 **MS. MOSKOW-SCHNOLL:** I see that I should stop
15 talking. Okay. Thank you, Your Honor.

16 **THE COURT:** We've got a lot to get to on the
17 objections to the magistrate's R&Rs on this stuff.

18 Do you want to -- why don't we do that and see
19 where we are? I want to resolve the Arnold award, too, or
20 at least get some understanding of where we are on that
21 because that was filed through you all.

22 And so, in some sense, it's a little
23 hypocritical for you to file. In that case, an objection
24 in these cases, but I do understand there are different
25 reasons for filing them.

1 And, in Arnold, it seems very likely that I'm
2 going to be asked to look at that and see whether it
3 informs a decision I have to make.

4 And the ones filed in Cornet, I do not have to
5 look at to make the decision I'm going to make in Cornet
6 on the motion to dismiss.

7 **MR. WALLACE:** Understood, Your Honor.

8 If I could have five minutes and come back and
9 be prepared to discuss that with you.

10 **THE COURT:** Okay. Yeah. Do you want to take
11 five minutes, and then we'll -- do you all have something
12 else before -- because I'm going to come back and finish
13 this, and then we'll go straight into the R&R.

14 We have plenty of time, but I am taking a train
15 back to D.C. this afternoon, so...

16 **MR. COHEN:** Okay. Good. Because I am taking a
17 flight back to Orlando this afternoon, too, so...

18 **THE COURT:** Let's take another five minutes,
19 and we'll be back.

20 (Whereupon, a recess was taken.)

21 **THE COURT:** Please be seated.

22 I realized I didn't let you talk about the
23 press motion. Do you have anything? Why don't you just
24 tell me if what I told them is -- what I'm probably going
25 to do is okay with you?

1 **MR. TRUJILLO-JAMISON:** Your Honor, I would
2 agree with your analysis. The only small thing I would
3 add is that because the documents were improperly in the
4 record, that that doesn't make them filed in connection
5 with a non-dispositive motion, such that the judicial
6 records would apply, and the right of the public access
7 would attach.

8 **THE COURT:** Okay.

9 **MR. WALLACE:** Your Honor, thank you for the
10 brief recess.

11 I have actually conferred with Mr. Cohen. And
12 we will agree to strike that document from the record,
13 subject to further negotiations concerning the contents of
14 the document.

15 And Mr. Cohen is reserving the right to refile
16 it, if he determines that it's beneficial to his position
17 in connection with the subject.

18 **THE COURT:** If either of you want to point to
19 that for what I suspect is going to be a discovery
20 dispute, it has to be -- I would ask you not to bother
21 with trying to file it under seal.

22 Just file it with whatever redactions you think
23 are appropriate if you're going to ask me to look at it
24 because I'm not going to file it under seal.

25 **MR. WALLACE:** Understood, Your Honor.

1 **THE COURT:** Okay. Thank you.

2 Okay. So let's get to the objections to the
3 R&Rs. Let's not do them all at once. Let's do them back
4 and forth on the first one, which is the third-party
5 beneficiary breach of contract, the fraud one.

6 We'll do that, and then we'll go on to the next
7 one, which is all about whether you can pierce the veil
8 and get to Mr. Musk personally. We'll do that one second.

9 So why don't we have X go first on your
10 objection because I think you have more objections than
11 they do on the breach of -- well, you all have objections
12 to all of them -- but, yeah.

13 By the way, I have read your papers. I
14 understand all the issues, so I don't need to know the
15 facts. You don't need to recite to them. If I have
16 questions, I'll ask you about them, so just get straight
17 to your objections to Judge Burke's Report and
18 Recommendation.

19 **MR. WALLACE:** Thank you, Your Honor.

20 So as to the no third-party beneficiary issue,
21 Judge Burke granted motion to dismiss with prejudice on
22 that, so I'll go to the next issue, which is breach of
23 contract and promissory estoppel.

24 I think it's imperative that when we're looking
25 at breach of contract, promissory estoppel claims, we

1 focus on what the alleged contracts are as asserted in the
2 complaint.

3 There's three primary docs at issue that I
4 referred to and defined in the complaint. There's the
5 severance stability promise, which is 6.9(a) of the merger
6 agreement. There's the acquisition FAQ, which was issued
7 shortly after the merger agreement. It just describes the
8 merger agreement. And there's the severance policy
9 e-mail, the May 13, 2022 e-mail. I'm using those
10 definitions straight from the complaint.

11 In paragraph 326 of the complaint, the
12 plaintiff argues that the severance policy e-mail and
13 related communications were the subject contract here.
14 Severance policy e-mail simply sets forth the general
15 proposition that severance then -- that Twitter's then
16 current severance policy -- not policy, but its current
17 severance plan provided for the payment of certain
18 benefits in the event of position elimination, and it was
19 done generally speaking -- or conveyed generally speaking.

20 It doesn't say, as alleged in the complaint,
21 anything about the merger agreement, about given employees
22 remains employed, prior to closing the merger and after
23 closing the merger, they'd be entitled to any level of
24 severance benefits. It doesn't reference the merger at
25 all. It doesn't mention anything about remaining

1 employed. This is a one-off e-mail from May 13, 2022,
2 talking about Twitter's then current general severance
3 position.

4 So we take the position as it's not a clear
5 definite promise or contract that can be relied upon or to
6 form a contract at all. And, therefore, the breach of
7 contract, promissory estoppel claims should be dismissed.

8 The promissory estoppel claim has one nuance,
9 in that it refers to the severance stability promise as
10 the promise. The severance stability promise is 6.9(a) of
11 the merger agreement.

12 So, again, it's just looking back at the merger
13 agreement and saying that the merger agreement says
14 they're entitled to certain benefits, and therefore,
15 entitled to his rights.

16 But as Judge Burke correctly found, the
17 plaintiffs are not third-party beneficiaries under the
18 merger agreement, and, therefore, they have no rights to
19 recover there.

20 So for that additional reason, the promissory
21 estoppel claim should be dismissed.

22 There are two plaintiffs here, Tracy Hawkins
23 and Joseph Killian, who both voluntarily resigned their
24 employment. That's not in dispute. The first amended
25 complaint completely discusses that fact.

1 There was a lot of ink spilled in the Report
2 and Recommendation and otherwise regarding whether or not
3 they were constructively discharged, which is the
4 allegation.

5 It's our position that -- defendants' position
6 that, irrespective whether they were discharged or not,
7 they're not entitled to severance payments for a position
8 elimination.

9 So even if the severance policy e-mail is
10 determined to be a contract or a promise of some sort, it
11 only applied in the instance of a position elimination.

12 To resign your employment is not a position
13 elimination or any definition. And, therefore, reading
14 the terms and words, which have to have meaning, at the
15 very least, the severance claims of those two individuals
16 must be dismissed.

17 Now for the fraud claim. The fraud claim is a
18 little confusing in the way that it's presented, in that
19 both Twitter and Mr. Musk moved to dismiss the fraud
20 claim.

21 Judge Burke dismissed, without prejudice, the
22 fraud claim as to Twitter, and no objection was filed as
23 to that fraud claim. So that decision stands. Assuming
24 there's no, you know, clear error, which there clearly
25 isn't.

1 As to Mr. Musk's motion to dismiss the fraud
2 claim, Judge Burke also granted that motion without
3 prejudice. Confusingly and inexplicably, in an objection
4 to that decision, the plaintiffs argue that it shouldn't
5 have been dismissed because they prevailed on Twitter's
6 motion to dismiss the fraud claim, which is not true. And
7 they can, therefore, prevail on Musk's motion to dismiss
8 through a theory of vicarious liability.

9 They do this despite the fact that, in their
10 response to the motion to dismiss in Paragraph 2, they say
11 plaintiffs adequately pled their fraud and wage theft
12 claims directly against Musk. They repeat that same
13 language throughout their brief, and, thus, Judge Burke
14 found that they weren't asserting those claims through a
15 theory of vicarious liability.

16 And, again, that's the problem where we face
17 all this issue with vicarious liability taking
18 inconsistent positions, from their complaint, to the
19 briefing, to anything else where no one can tell when
20 they're asserting, or where, against whom, or anything.
21 That's the issue with the notice pleading where we're
22 having here.

23 In any event, the vicarious liability claim for
24 fraud can't stand because, one, the claim against Twitter
25 has been dismissed already, so there is nothing to be

1 vicariously liable for. And two, they didn't plead it
2 that way.

3 But also, the entire fraud claim is based
4 solely on one allegation that, upon information and
5 belief, Musk allegedly, you know, intended Twitter to
6 communicate details concerning Section 6.9 of the merger
7 agreement.

8 As Judge Burke correctly found, there's no
9 particularity stated with respect to any allegations
10 concerning the fraud allegations and Mr. Musk. Therefore,
11 it does not satisfy the required pleading, particularly,
12 pleading requirements under 9(b).

13 As Judge Burke says, they're conclusory.
14 There's no concrete facts. There's bald assertions. We
15 agree to all those things. They didn't adequately plead a
16 claim of fraud -- plausibly plead a claim for fraud
17 against Mr. Musk correctly.

18 Therefore, the fraud claim should be dismissed.

19 **THE COURT:** Well, on the two specific
20 individuals, I understand that they resigned, but had made
21 allegations of constructive discharge. And I hear your
22 argument on position elimination.

23 What if, instead of them resigning, Mr. Musk
24 had, or whoever the management was, I don't know -- let's
25 just say "X" and make it easier. X told these two

1 individuals, "Do these things," they objected, said, "We
2 won't do it," and he fired both of them.

3 Would that be a position elimination?

4 **MR. WALLACE:** No, Your Honor. That would be
5 termination for cause as opposed to position elimination,
6 which has a specific definition under the law, in essence.

7 **THE COURT:** And your view is that even if the
8 severance policy applies, and I don't agree with you on
9 the breach of contract and all the like, that there's a
10 difference between people entitled to severance under the
11 policy and people who are discharged for cause.

12 **MR. WALLACE:** Yes, Your Honor.

13 **THE COURT:** Okay.

14 **MR. WALLACE:** Similar to people who voluntarily
15 resign as part of the fork-in-the-road e-mail we talked
16 about, I think, last time, I also addressed today. That's
17 not a position elimination.

18 So even if you take the contract, as you say,
19 and say, "This is a contract. This is enforceable. We
20 have to enforce it according to the terms," then, it says
21 position elimination very clearly.

22 So I think that leaves --

23 **THE COURT:** I guess my question is: How do we
24 know that's necessarily true?

25 I mean, couldn't that mean that X could have

1 come in, and for all these people that should have got --
2 or would have gotten severance because their positions
3 were eliminated, instead of saying, "Your position's
4 eliminated," they said, "You're fired for cause," and that
5 gets them out of the severance agreement?

6 In other words, I'm not suggesting this is true
7 or that there's an allegation to the fact.

8 **MR. WALLACE:** Right.

9 **THE COURT:** Appellate judges ask hypotheticals.
10 They're hypotheticals.

11 But if they're trying to basically mask their
12 underlying intent to eliminate positions by saying it's
13 for cause; even though, it's really just position
14 elimination, and they don't want to pay severance.

15 **MR. WALLACE:** I think that's a different case.
16 I also think that there may be additional facts we need to
17 develop concerning those issues, including whether the
18 position was truly eliminated.

19 Was someone hired to replace the person?
20 Positions continue to exist. All things of that nature.

21 But here, I think there's, you know, kind of
22 three types of plaintiffs, which I don't think there's any
23 dispute. They're individuals who were laid off as part of
24 a mass layoff November 4, and subsequent mass layoffs who,
25 arguably, maybe can say their position was eliminated.

1 Now, whether or not that -- even if it's found
2 to be a contract -- applies in the situation of a mass
3 layoff, I don't know that I would go that far because I
4 think there's still a nuance there.

5 But I think we're getting farther away from the
6 nuance the more we go towards you were fired or you
7 resigned because you didn't want to take some action, and
8 that's not a position elimination.

9 **THE COURT:** Okay.

10 **MR. WALLACE:** I think the final thing, before
11 veil piercing, would be the wage theft, which, again, I
12 think is rather confusing. They're wage theft claims
13 asserted --

14 **THE COURT:** Is this one the second?

15 **MR. WALLACE:** I think so. But I think so was
16 fraud. So --

17 **THE COURT:** Right. I --

18 **MR. WALLACE:** Okay. Yeah.

19 **THE COURT:** Let's just go do them all, then,
20 once you started done that road.

21 **MR. WALLACE:** Okay. Yeah, it's hard to keep
22 track of what's what, so I apologize for that.

23 The wage theft claim -- there are three
24 claims -- claims asserted under three state laws, Texas,
25 New York, California. Magistrate Judge Burke found that

1 there's no prior action for wage theft under Texas law and
2 dismissed that claim. There's been no objection filed as
3 to that claim. Presumably, it's gone.

4 In New York and California, Judge Burke found
5 that, again, the plaintiffs failed to plead facts to
6 establish that Mr. Musk was plaintiffs' employer as
7 required to establish direct liability against him under
8 New York and California law.

9 In response --

10 **THE COURT:** The claims as to X are still in the
11 case, there's no motion to dismiss on those, right?

12 **MR. WALLACE:** There is a motion to dismiss on
13 those. You're correct, Your Honor. You're correct on
14 that. I apologize.

15 **THE COURT:** So now, you're just purely talking
16 about piercing the veil.

17 **MR. WALLACE:** Well, this would be --

18 **THE COURT:** I didn't really want to go through
19 this claim by claim, I wanted to know your underlying
20 objection to the legal test for piercing the veil and why
21 or why not there weren't sufficient allegations in the
22 complaint on that because I think this is a very unclear
23 issue, and I think -- I mean, Judge Burke looked at it and
24 he ruled. Let me say this.

25 I changed my mind again. I don't want to talk

1 about this. We're going to talk about this differently.
2 It is such a distinct issue, and I'm going to lose track
3 of what you just talked about.

4 So you've talked about breach of contract;
5 you've talked promissory estoppel; you've talked about
6 fraud.

7 Is there anything else with regards to the
8 first, what I'm calling the first, Report and
9 Recommendation you want to raise?

10 **MR. WALLACE:** I don't believe so, Your Honor.
11 I think that covers all the claims.

12 **THE COURT:** Okay. Let's hear from...

13 **MR. COHEN:** Thank you, Your Honor.
14 Just a reminder, I'm Akiva Cohen. Let me
15 address --

16 **THE COURT:** I want to try to keep this
17 straight.

18 **MR. COHEN:** Yes.

19 **THE COURT:** You are the Arnold plaintiffs.

20 **MR. COHEN:** I am the Arnold plaintiffs'
21 attorney.

22 What I'd like to do, with Your Honor's
23 permission, is first address the issues that Mr. Wallace
24 brought up and then move into the third-party beneficiary
25 issue that he didn't touch.

1 **THE COURT:** Okay.

2 **MR. COHEN:** So let's just go sort of piece by
3 piece.

4 Position elimination, which has come up a
5 little bit, is a wholesale red herring. It has nothing to
6 do with anything.

7 Let's just back up a step.

8 What Twitter told these people was, "Your
9 severance cannot be changed from our existing policy in
10 any way that makes it less than our existing policy."

11 And then, when people said, "Well, what's the
12 existing policy," they sent out an e-mail that said,
13 "Well, a good general way to describe it is, in the event
14 of position elimination, you get the following things."

15 That does not mean that the promise -- that the
16 severance couldn't be less than what was available under
17 the prior policy was limited to situations of position
18 elimination.

19 **THE COURT:** So your view is that the prior
20 policy included firings for cause.

21 **MR. COHEN:** It did, in fact. We didn't plead
22 it in the complaint because we don't need to plead
23 evidence, but we have their severance policy matrix that
24 has, you know, mutual separation, and all sorts --

25 **THE COURT:** Where would you put -- I mean, I

1 don't tend to view constructive discharge -- constructive
2 discharge isn't fired for cause. What bucket would you
3 put that in?

4 **MR. COHEN:** I would put it under a firing
5 without cause. That's what it is. It's somebody who was
6 terminated without cause.

7 **THE COURT:** I mean, in the federal employment
8 world that I do happen to know that, is where it comes in.
9 If you're a federal employee and are forced to resign as a
10 constructive discharge, it's considered an appealable
11 offense.

12 **MR. COHEN:** Correct. And --

13 **THE COURT:** You know, that's how I feel.

14 **MR. COHEN:** Yes. And that's how these state
15 laws treat it as well. And so, to whatever extent they
16 were entitled to severance for a termination under
17 Twitter's prior policy, they are entitled to severance
18 under this policy.

19 The same, by the way, is true for the folks who
20 got fired for not being willing to say that they were
21 going to work hardcore.

22 And, frankly, I will tell you --

23 **THE COURT:** I get it. The explanation e-mail
24 can't reduce the rights they already had. That's at least
25 your allegation.

1 **MR. COHEN:** Exactly.

2 **THE COURT:** Okay.

3 **MR. COHEN:** And so to the extent --

4 **THE COURT:** For the two people, you think it
5 makes no difference whether they're termed, constructive
6 discharge, or whatever?

7 **MR. COHEN:** Correct.

8 **THE COURT:** Now, do we have -- I don't recall
9 if this was specifically an issue.

10 Do we have a dispute about people that
11 voluntarily resigned?

12 **MR. COHEN:** No.

13 **THE COURT:** That's not in these cases right
14 now?

15 **MR. COHEN:** No, we do not, Your Honor, but we
16 have a dispute. I'm not sure if any of these six
17 plaintiffs were November 17th plaintiffs. November 17th
18 was the date on which people who did not affirmatively
19 click a button to say they wanted to stay, were fired.

20 **THE COURT:** That's a different issue,
21 affirmatively resigning.

22 **MR. COHEN:** We do have a dispute over whether
23 that is a resignation at all.

24 And, in fact, I know for a fact that there were
25 folks who were fired despite sending e-mails to their

1 manager saying, "Just so you know, I'm not resigning. I'm
2 perfectly willing to continue showing up to do my job, I'm
3 just not clicking this button. And if you want to fire me
4 for that, you can fire me for that."

5 **THE COURT:** Okay.

6 **MR. COHEN:** That's not a resignation.

7 **THE COURT:** I feel like we may have one of
8 those in the Cornet cases.

9 **MR. COHEN:** We do, and we certainly have other
10 plaintiffs among our plaintiffs group.

11 **THE COURT:** I don't want to belabor that.

12 Okay. So I understand your point on those two
13 specific individuals.

14 Can you address, more broadly, his views that
15 the documents you cited don't create either an enforceable
16 contract or a promise --

17 **MR. COHEN:** Yes.

18 **THE COURT:** -- that can be enforced?

19 **MR. COHEN:** Yes.

20 So Number 1, again, he wants to narrow this
21 down to look only at the e-mail that came in the context
22 of, first Twitter communicating to the employees that
23 their severance was protected, and the employees asking,
24 "So tell me what the current severance plan is," and then
25 the -- which is why we said in the allegation, the e-mail

1 and the related communications.

2 Meaning when Twitter tells them "Hey, your
3 severance is protected and can't be reduced from what our
4 current policy is."

5 And then the employees say, "So tell us what
6 the current policy is."

7 So the promise is that your severance -- the
8 merger agreement has specific special protections for
9 employees' severance and for a one-year period, it cannot
10 be reduced.

11 And, Your Honor, my friend, Mr. Wallace,
12 mentioned clear error with respect to fraud. To the
13 extent that the breach of contract claim gets dismissed on
14 the basis that none of the parties ever intended for the
15 severance provisions in the contract to be enforceable and
16 to provide any special protection, then it is clearly
17 error to dismiss a fraud claim for Twitter telling the
18 employees that those provisions did give them special
19 protection because their entire defense is, "Yeah, we
20 never intended it to."

21 **THE COURT:** Can you sort out for me whether
22 your breach of contract and promissory estoppel claims --
23 to what extent do they stand alone from the merger
24 agreement, or do they require the merger agreement?

25 **MR. COHEN:** They don't require the merger

1 agreement because what they stand on is Twitter's
2 representations to the employees about the merger
3 agreement.

4 And, to be clear, if there was no provision in
5 the merger agreement that said anything about employee
6 severance, and Twitter decided, "Hey, we're really
7 concerned about losing employees in the run up to this
8 merger. Why don't we tell them that there's something in
9 the merger agreement that protects severance?"

10 Give you a better example. We'll take it into
11 a different hypothetical.

12 Instead of saying, "Look, if you stay through
13 the merger, essentially, you're going to have your
14 severance protected," they would have said, "Hey, guys.
15 There's a provision in the merger agreement that says
16 every employee that stays through the close of the merger
17 gets their very own golden retriever."

18 That's not in the merger agreement, but it
19 would still support a breach of contract in a promissory
20 estoppel claim if they didn't follow through.

21 **THE COURT:** Okay.

22 **MR. COHEN:** The fact that it's in the merger
23 agreement makes the breach also a breach of the merger
24 agreement. And that gets us to the third-party
25 beneficiary issue.

1 But even without that, the promissory estoppel
2 and breach of contract, oral contract, and written
3 contract claims on the representations.

4 **THE COURT:** So let me ask you this.

5 **MR. COHEN:** Sure.

6 **THE COURT:** Because I think the Arnold
7 plaintiffs are not a class, right? They're just
8 individuals?

9 **MR. COHEN:** Correct.

10 **THE COURT:** What is the third-party beneficiary
11 get you that a breach of contract or promissory estoppel
12 claim wouldn't get you?

13 **MR. COHEN:** So it does a couple of things, Your
14 Honor.

15 Number 1, pretty much all of the states where
16 these plaintiffs are have provisions in their law that say
17 that if there is a bad-faith refusal to pay a contracted
18 amount when you terminate an employee, there are statutory
19 penalties.

20 And so, to the extent that what we have is a
21 very clear breach of the merger agreement that these folks
22 can enforce, and if that promise is --

23 **THE COURT:** Why doesn't that apply equally to
24 the contract claims, though?

25 **MR. COHEN:** So --

1 **THE COURT:** If it was bad faith not to follow
2 the promise or the contract -- or maybe it doesn't work
3 with promissory estoppel.

4 But if you're right on the contract that they
5 had a contract to pay the full severance, and they didn't
6 do it in bad faith, wouldn't that same state law apply?

7 **MR. COHEN:** Absolutely, it would, Your Honor.
8 It's just a question of -- so the question is: Is it
9 duplicative?

10 And the answer is no, because the things that
11 are going to be in dispute on each of those claims are
12 different things, right?

13 On the breach of the merger agreement, the only
14 thing that's really in dispute is, "Can my clients enforce
15 that provision?"

16 And if the answer to that is yes, they're done.

17 If, on the breach of contract provision based
18 on the communications, they have a defense that they've
19 raised that that's not a contract at all, it's not
20 specific enough, or a reasonable person wouldn't have
21 understood, all of those things -- look, frankly, we think
22 they're going to lose on all of those issues.

23 But those are different arguments on different
24 issues, and, therefore, we have to have them each
25 separately.

1 **THE COURT:** Okay. So it's harder to prove one
2 way or the other. But aside from the state law stuff,
3 which doesn't seem to make a difference -- are the damages
4 going to be the same under either theory?

5 **MR. COHEN:** The damages under either theory are
6 going to be the same and they're going to be the same for
7 promissory estoppel as well because this is one of those
8 promissory estoppel cases where the damages are -- you get
9 what you were promised, not what you get what your loss
10 was from the reliance because it's going to be just
11 impossible on a case-by-case basis to show what that
12 damage is because it's a complete counterfactual of what
13 would have happened, had somebody gone in to a different
14 market or how do you value somebody voting their shares in
15 favor of the merger based on these representations.

16 **THE COURT:** So I want to give you a brief
17 opportunity to speak on the actual, you know, whether you
18 are a third-party beneficiary of the merger agreement. I
19 had argument already. I don't know if you reviewed the
20 transcript.

21 **MR. COHEN:** I was there for it, Your Honor.

22 **THE COURT:** Oh, were you?

23 **MR. COHEN:** Yes.

24 **THE COURT:** Okay. I apologize. I can't
25 remember everybody.

1 **MR. COHEN:** No, it's fine.

2 **THE COURT:** Then you probably recall that I'm
3 pretty skeptical of the third-party beneficiary argument
4 based upon what I think is a pretty clear disclaimer in
5 the merger agreement.

6 **MR. COHEN:** Yes, Your Honor.

7 **THE COURT:** Do you want to get on the record
8 why you would disagree?

9 **MR. COHEN:** I do, and I hopefully can convince
10 you of why you are wrong about that.

11 And I think, to do that, we have to look real
12 closely at the text of the merger agreement itself. If it
13 would be helpful, I have just a short selection of the
14 actual provisions, so that you can look at the text.

15 **THE COURT:** Sure. Does he have that, too?

16 **MR. COHEN:** I'm about to hand it to him.

17 **THE COURT:** Okay. Thanks.

18 Do you have another one for my clerk?

19 **MR. COHEN:** I do not have another one for your
20 clerk. That was unwise. I apologize. I will give him
21 mine when I am done --

22 **THE COURT:** That's okay --

23 **MR. COHEN:** -- or her.

24 **THE COURT:** Do you know what they are?

25 **MR. COHEN:** So I think the first thing we have

1 to do is we start with 9.1, which is the non-survival.

2 Twitter's argument here, and X's argument here
3 is that Section 6.9 meant nothing, imposed no obligations,
4 and was not in agreement that required performance at all.
5 It was merely a statement of intent. And therefore, you
6 can write it out of the contract.

7 That's a problem under Delaware law. You can't
8 just write provisions out of a contract. But it's also a
9 problem straight from the text of the agreement because
10 what the parties agree, in Section 9.1, expressly is that
11 Section 6.9 is a section that contains an agreement of the
12 parties which, by its terms, contemplates performance
13 after the effective time.

14 So it's not a statement of intent. It is a
15 covenant and agreement of the parties that is specifically
16 intended to be enforceable after the close of merger, so
17 much so that they exempt it from the provision that says
18 "everything is retired as soon as the merger closes." So
19 that's Number 1.

20 And so the question then becomes, Your Honor,
21 well what are the agreements and covenants in Section 6.9.
22 And, again --

23 **THE COURT:** I understand all this. You didn't
24 actually give me -- I understand that it's not helpful to
25 your side, but you didn't give me the provisions that

1 specifically say there's no third-party beneficiary.

2 **MR. COHEN:** I did, Your Honor. It's the last
3 page because that's -- 6.9 goes from (a) through (e).

4 **THE COURT:** Oh, sorry. So 6.9(e).

5 **MR. COHEN:** Yes, 6.9(e). So 6.9(a), (b),
6 (c) -- because I think what we have to do, Your Honor, is
7 look at the whole text of this section. It's very clear
8 from the text of the section, as a whole, that these are
9 heavily negotiated provisions that are directly intended
10 to provide benefits to the continuing employees.

11 It says, specifically in 6.9(a), that these
12 benefits are to be provided to the continuing employees.
13 And it not only says, "Hey, you have to give these
14 benefits," but it creates different standards for how to
15 assess compliance for the different categories of
16 benefits.

17 So for base salary and wage rate, at least the
18 same. Meaning, you can't even change the metric. If
19 somebody was paid hourly, they've got to get paid at least
20 the same hourly rate.

21 If they're paid a base salary, they have to be
22 paid the same base salary.

23 For incentive compensation, we don't care how
24 it gets composed, but it has to be no less favorable in
25 the aggregate, meaning the total of the different

1 components has to be at least as much.

2 For the next set, which is for employee
3 benefits, it's substantially comparable. So it doesn't
4 have to be at least as favorable or at least the same. It
5 could be a little bit less, as long as it's close. And
6 then for the severance benefits, it's not at least the
7 same because Twitter was allowed to change the components.
8 But it has to be no less favorable than those applicable
9 to the continuing employees.

10 **THE COURT:** I get all this.

11 **MR. COHEN:** Yeah.

12 **THE COURT:** You gave me one of me the no
13 third-party claims. Do you have 9.7?

14 **MR. COHEN:** No, because 9.7 is sort of a
15 general catch-all.

16 Let me put it this way, Your Honor, if 6.9(e)
17 applies to this and says they are non-third-party
18 beneficiaries, then 9.7 for this discussion is
19 superfluous. And if 6.9(e) you conclude doesn't control,
20 then 9.7 doesn't change that. And so I didn't want to
21 bring in extraneous matters. But 9.7 just say no
22 third-party beneficiaries other than these.

23 So the issue here, Your Honor, is --

24 **THE COURT:** I mean, I'm not sure I agree with
25 your reading of 9.7. Maybe it's just because it seems --

1 because it's isolated and maybe it just says the same
2 thing as 6.9(e).

3 But are the employees parties to this
4 agreement?

5 **MR. COHEN:** They are not. So if they can
6 enforce, they can enforce as third-party beneficiaries.
7 And I think if you look at the decision --

8 **THE COURT:** Well, isn't that the problem? I
9 mean, with 9.7, it says it's not intended to and shall not
10 confer upon any person other than the parties hereto --

11 **MR. COHEN:** Uh-huh.

12 **THE COURT:** -- any rights under the agreement.

13 **MR. COHEN:** Right.

14 **THE COURT:** They are not a party to the
15 agreement, and 9.7 seems to suggest that there are other
16 persons that have no third-party beneficiary rights.

17 **MR. COHEN:** Yes. Except, Your Honor, that
18 Delaware law says very clearly that such provisions are
19 not dispositive. They are given weight, but they do not
20 control and they will occasionally yield to other contrary
21 provisions in the contract. And that's not: Well, if
22 there's a carve out.

23 **THE COURT:** I get it. I get there are clauses
24 in here that protect employees. But just a clause
25 protecting employees is not enough to give an employee

1 cause of action to an agreement that it's not a party to,
2 at least my view, unless it's explicit.

3 And you seem to be asking me to infer from all
4 the protections in 6.9, all these sections, that they must
5 have intended these rights to be given to employees
6 because, otherwise, they would be unenforceable.

7 **MR. COHEN:** So that's -- there are two
8 distinctions there, Your Honor, and two things that I
9 think go wrong there, right?

10 So, Number 1, Delaware law -- if you look at
11 the cases, and particularly *Wilmington Housing Authority*,
12 says, "Parties don't get to decide in their contracts
13 whether somebody has rights. What they decide is whether
14 or not they give somebody benefits."

15 So what's a third-party -- what's a no
16 third-party beneficiary provision?

17 That is something that is there to address a
18 situation where there's a clause in a contract that gives
19 benefits that benefits in some way multiple people, right?

20 So, for example, if you contract with me, I say
21 I'm going to provide you legal services, and I say you're
22 going to pay my son's college tuition.

23 **THE COURT:** Let me stop you. Are you saying
24 that if the two parties decide we're going to lay out
25 here -- the old company and the acquiring company, as part

1 of the merger agreement, say: Look, as part of the
2 agreement, here is a list of things we think the new
3 company should do for employees, and then in a separate
4 section it says: But this agreement is not intended to
5 benefit the employees or create a cause of action for the
6 employees to enforce this, that, nonetheless, there could
7 still be a third-party beneficiary claim?

8 **MR. COHEN:** Should do, no. Must do, yes.
9 Because a must-do clause, a clause that says that after
10 the close of the merger, the following must take place,
11 only benefits the employees. It doesn't benefit the old
12 company, it's after the close of the merger. It doesn't
13 benefit the acquirer. They are now bound by an
14 obligation.

15 The only party being benefited by those
16 provisions is the employees. And what Delaware law says
17 is: If there's a clause in a contract that nobody can
18 enforce because the only person benefiting is a third
19 party, then that person is a third-party beneficiary.
20 Because to say anything else would be to read that clause
21 out of the contract.

22 What *Dolan* teaches, is that where you have a no
23 third-party beneficiary clause and something that can only
24 be enforced by a third party, to the extent that they are
25 truly contradictory, that, by definition, must be read as

1 ambiguous and, therefore, it's a question for discovery;
2 it's a question of fact which one of those controls
3 because the court's role is to harmonize.

4 **THE COURT:** So what if the merger agreement was
5 not you have to do something, but you should keep the same
6 severance plan and the like and then have a third-party
7 beneficiary?

8 **MR. COHEN:** Then the employees would be
9 completely out of luck. Then they would only have a
10 promissory estoppel claim.

11 But that's not this merger agreement. This
12 merger agreement is very clearly a mandatory provision.
13 And, Your Honor, I heard you ask Mr. Wallace on the
14 15th -- you've seen it in the papers -- they cannot come
15 up with any interpretation of that agreement other than --
16 of those provisions of that agreement where those
17 provisions do anything at all.

18 They are asking you to write it out of the
19 agreement.

20 And what Chancellor McCormick found in *Crispo*
21 was there is a different reasonable explanation of the no
22 third-party beneficiaries provision that allows you to
23 harmonize them with the mandatory provisions of the
24 contract so as to not write them out of the agreement.

25 Now, she was talking about different

1 provisions. She was talking about the shareholder
2 damages. But that reasoning applies directly here because
3 the way to harmonize this is to say that no third-party
4 beneficiary provision means we are not letting anybody
5 else enforce this merger agreement before the merger
6 closes.

7 You have no right to say, Hey, I want this
8 merger to go through because I like what's happening to my
9 benefits and if these parties break up the merger, even if
10 one of them could enforce the merger agreement, if they
11 decide they don't want to, you, employee, are not a
12 third-party beneficiary just by virtue of the fact that if
13 the merger had closed, but now --

14 **THE COURT:** I get your argument on this point.

15 **MR. COHEN:** Thank you.

16 **THE COURT:** Is there anything else on the R&R
17 you want to briefly touch on the fraud?

18 **MR. COHEN:** So on the fraud, Your Honor, so two
19 things.

20 Mr. Wallace missed a point when he was talking
21 about Mr. Musk, which is: With respect to Mr. Musk -- and
22 we did very clearly say for anything where we don't have a
23 direct claim, veil piercing.

24 But with respect to Mr. Musk, it's not just
25 that he would be veil piercing through Twitter, it would

1 be through X Corp. We have a fraud claim against X Corp,
2 X Holdings Corp., which is the acquiring corporation. And
3 that fraud claim was not the subject of any dismissal
4 motion.

5 They moved to dismiss the fraud claim against
6 Twitter. They moved to dismiss the fraud claim against
7 Elon Musk. They never moved to dismiss the fraud claim
8 against X Holdings Corp., the holding company, and we do
9 have a fraud claim against that company, and we have
10 alleged that he is liable through veil piercing for any
11 fraud claim against that company. So that claim hasn't
12 been dismissed, the underlying claim.

13 **THE COURT:** Anything else?

14 **MR. COHEN:** The last thing on fraud, Your
15 Honor, and I apologize for running long, but the last
16 thing on fraud is if, as they are arguing and as Judge
17 Burke found, the parties never intended for this -- these
18 provisions to provide any protection for the employees
19 because they were always intended to be unenforceable,
20 then telling the employees that they specially protected
21 the benefits in the merger agreement is fraud. It is a
22 false statement. It is a knowingly false statement, and
23 it has to be knowingly false because the claim is we never
24 intended it to work this way -- intended to induce
25 reliance, which did induce reliance and damages. It's

1 fraud.

2 **THE COURT:** Can we hear from opposing counsel
3 again?

4 **MR. COHEN:** I will pass the second one of
5 these.

6 **THE COURT:** Thanks.

7 **MR. WALLACE:** Thank you, Your Honor.

8 **THE COURT:** Let's go to the third-party
9 beneficiary stuff because, I mean, we have a very clear
10 statement that said there's no third-party beneficiaries.

11 But can you just respond to the point that
12 there are a series of things in 6.9 that says that these
13 things shall be provided to the employees? Why isn't that
14 enough to make it clear that they are the beneficiaries of
15 that?

16 **MR. WALLACE:** So, Your Honor, the hallmark of
17 all of this, the first step of determining whether someone
18 is an intended third-party beneficiary is whether the
19 parties intended to give them that right.

20 To look at -- and that is, you know, black
21 letter *E.I. du Pont v. Shell*, that both parties are
22 relying on, says, "The basic rule of contract construction
23 gives priority the intention of the parties."

24 And Mr. Cohen repeatedly talks about this rule
25 under Delaware law, that if no one can enforce the

1 provision, then it must mean that this other person can
2 enforce it. Perhaps that's the case when there's not an
3 express provision like 6.9(a)(2) that says the parties do
4 not intend for you to be a beneficiary.

5 Furthermore, as to that point, there's --
6 it's -- the courts endeavor, through contract construction
7 principles, to identify a way to ascertain the intent when
8 it's unclear. Here, the intent couldn't be clearer.

9 And the courts say, when possible, we should
10 look at all provisions to harmonize them. Didn't say this
11 is a mandatory rule. Because the mandatory rule would
12 swallow the parties' intent. If we're writing anything
13 out, we would be writing out the part that says: You are
14 not intended third-party beneficiary.

15 So, I mean, I think that's the simplest way to
16 cut that.

17 **THE COURT:** Can I just see if I can try a
18 different way.

19 Even if this agreement expressly mandates that
20 the takeover corporation shall provide this list of
21 benefits to employees, and that's a legal obligation, that
22 unless the contract, the merger agreement also
23 demonstrates some kind of intent for the employees to be
24 direct beneficiaries of that -- I guess my problem is, who
25 else would those clauses be benefiting except the

1 employees themselves?

2 **MR. WALLACE:** I think there is a predicate
3 issue, which is 6.9(e)(1), which we haven't talked about.
4 6.9(e)(1) gives Twitter the absolute right to modify,
5 change or eliminate those benefits.

6 So to the extent there were any kind of
7 ambiguity in the contract, I think it's between (e)(1) and
8 (a), perhaps at most. But you don't get there because of
9 (e)(2), which says there's no intended third-party
10 beneficiaries. Or the employees are not intended
11 third-party beneficiaries.

12 So I don't think -- while we're saying (a) has
13 all of the shall language and it's mandatory, I think
14 (e)(1) unwinds that, also, in allowing the parties to
15 modify -- or allowing Twitter to modify that provision.

16 But even so, you know, talking about, you know,
17 rules of construction and contract principles, when
18 there's one provision that we're trying to find a way to
19 give meaning to, the courts say we don't just make it up
20 if it runs counter to the agreement's overall scheme or
21 plan. The overall scheme or plan here was not to give
22 employees beneficiary entitlement under this contract.

23 **THE COURT:** Okay.

24 **MR. WALLACE:** Your Honor, would you like to
25 talk about vicarious liability or would you like to --

1 **THE COURT:** Wait. Do you mean piercing, is
2 that the same thing as piercing the veil?

3 **MR. WALLACE:** Yes, Your Honor.

4 **THE COURT:** Let's hear from them first on that
5 point.

6 **MR. WALLACE:** Okay.

7 **THE COURT:** I know it's your motion to dismiss,
8 but if you want the last word -- well, I think you have
9 the last word anyway.

10 Okay. Here's my issue with what Judge Burke
11 decided, and I think he did something that was entirely
12 fine in exercising his discretion to rely on forfeiture,
13 and if I was an appellate court, it's not reversible,
14 probably, but I'm not an appellate court here.

15 I'm not going to find forfeiture. I'm just
16 not. I think the allegations of veil piercing here in
17 your complaint are not very specific, so it's very hard
18 for me to see how they were even put on significant notice
19 that that was going to be a huge argument.

20 Sure you have a section -- they're very
21 vague -- about how they meet the standard.

22 And so here's the question I have for you, is
23 they moved to dismiss and didn't really discuss this very
24 much, which is why he found forfeiture. You put in a big
25 response. They got a really big reply that you had never

1 seen before.

2 Do you want -- if I don't find forfeiture, do
3 you want the opportunity to address that reply more
4 fulsomely and give them a surreply, or do you think
5 between the briefing we've had and the objections to the
6 R&R that I have enough?

7 **MR. COHEN:** No. It would certainly need a
8 separate -- separate briefing on that issue, Your Honor.

9 I do think that in terms of the standard for
10 reviewing the magistrate's exercise of discretion there,
11 and we did put it in our papers that because it's an
12 exercise of discretion on a matter committed to his
13 discretion, if you are going to reverse it, you are
14 required to find that he abused his discretion, same as
15 for an appellate judge. I think that's what the cases
16 say. Obviously if you have a different view of that --

17 **THE COURT:** That seems to me to be odd, but
18 I'll look at it.

19 As you know, I don't sit in this chair very
20 often, and for something like that where --

21 **MR. COHEN:** What the cases say is on a matter
22 that's committed to the magistrate's discretion, it's only
23 reviewed for abuse of discretion, and that's true even if
24 that exercise of discretion is within the context of a
25 dispositive motion.

1 The cases are -- you know, there's a Delaware
2 case that was a motion for summary judgment on a patent
3 case, and he exercised -- magistrate exercised discretion
4 to consider a forfeiture issue.

5 **THE COURT:** Has this issue been briefed?

6 **MR. COHEN:** It was in our response on their
7 objection to the R&R. So it was, in fact, briefed. So
8 that's one issue.

9 But if you are going to reverse his exercise of
10 discretion, I would think that the right thing to do there
11 is essentially just set it down for a new motion to
12 dismiss on that.

13 **THE COURT:** You've given me a little bit to
14 think about. So in order to save time, we'll go
15 through -- I want to go through the merits of the veil
16 piercing a little bit based on the allegations and
17 standards. But if I'm going to let you rebrief that, I
18 would also like you to brief the standard review for me on
19 his decision on forfeiture.

20 **MR. COHEN:** Absolutely.

21 **THE COURT:** Because I did not understand myself
22 to be -- to owe him any deference on that point. And if I
23 do, then it changes the calculus, obviously.

24 **MR. COHEN:** Yes.

25 **THE COURT:** Because I think I just told you

1 it's not abuse of discretion for him to find forfeiture.
2 I think that's right.

3 **MR. COHEN:** Correct.

4 **THE COURT:** The way this case has been -- the
5 allegations on this issue were set out and the way it was
6 done seemed like you all could have done something
7 differently.

8 **MR. COHEN:** Understood, Your Honor and --

9 **THE COURT:** On both sides.

10 **MR. COHEN:** And to be clear --

11 **THE COURT:** I don't think it's particularly a
12 forfeiture, at the end of the day. It is usually an
13 equitable decision, and I'm not sure I find it equitable
14 to get rid of their defense on the issue.

15 **MR. COHEN:** To be clear, I don't think it gets
16 rid of their defense. It just means they didn't move to
17 dismiss. So it would be addressed --

18 **THE COURT:** I understand.

19 **MR. COHEN:** -- in summary judgment.

20 **THE COURT:** But that -- it goes away and
21 there's lots of discovery that might be avoided if it is
22 properly dismissed at the 12(b) (6) stage.

23 Okay. So on the merits -- and again,
24 Judge Burke didn't get to this -- but on the merits, why
25 do you think the allegation in your complaint are

1 sufficient to show the type of control that we would
2 pierce the veil?

3 **MR. COHEN:** On the merits, I think we laid out
4 Elon Musk was the person actively making the decisions for
5 the entity, and not just the person actively making the
6 decisions for the entity, but he was intermingling its
7 assets with assets from his other entities and essentially
8 just treating everything as one big pool of Elon Musk
9 asset as opposed to independent, separate corporations.

10 He was also, frankly, treating corporate
11 decisions as personal decisions without any regard for
12 fiduciary duties or anything like that. He was simply
13 acting as Elon Musk playing with Elon Musk toys.

14 And Elon Musk toys are quite large and fun, I
15 get that, but that becomes the predicate for a veil
16 piercing, particularly where somebody with those resources
17 decides to purchase this in such a way that he loads it
18 down with debt, expressly says himself that it is
19 insufficient to carry on its business as currently
20 constructed, argues that the lack of assets and the debt
21 load is part of why he has to breach the contract, and
22 puts the company at risk of bankruptcy.

23 We cited to you, Your Honor, in our response to
24 their objections, a litany of California cases that say
25 where you create that inequitable risk of bankruptcy by

1 undercapitalizing, even if it's not with any sort of ill
2 intent, that is sufficient inequitable conduct to support
3 veil piercing.

4 I will note, Your Honor, that even if the Court
5 doesn't find forfeiture and wants to reopen briefing, that
6 briefing really should be limited to the issue of whether
7 or not we alleged sufficient inequitable conduct or a
8 sufficient inequitable result to allow for veil piercing.

9 They did not suggest at all in their opening
10 brief that we had insufficiently alleged the identity of
11 the sort of economic entanglement. That issue, they
12 simply passed on entirely. Not even mentioned it in their
13 footnote.

14 And so I think, Your Honor, it would be
15 inappropriate to essentially give them a second bite of
16 that apple.

17 **THE COURT:** Well, if I'm opening briefing, it's
18 not to start over. It is to give you an opportunity to
19 reply to whichever chain in the brief. They put in a
20 footnote, you put in opposition that was more fulsome,
21 then, they came back with a much bigger brief.

22 They are confined to what they briefed in that
23 bigger brief. You get a reply on that.

24 **MR. COHEN:** The issue I'm raising, Your Honor,
25 is in that bigger brief, they didn't just put in a fulsome

1 reply on our reply, they opened an entirely new issue that
2 they hadn't even raised in the footnote. And so that's --

3 **THE COURT:** I think that is going to go part
4 and parcel with my forfeiture decision, and you will be
5 given an opportunity to respond. Okay?

6 **MR. COHEN:** I appreciate it.

7 May I just address (e) (1), since he brought
8 that up?

9 **THE COURT:** Sure.

10 **MR. COHEN:** So 6.9(e) (1), again, it actually --
11 there are two issues there. Number 1 is you can easily
12 harmonize that with the rest of 6.9 by just cabining it
13 and saying it's a belts-and-suspenders way of saying,
14 look, you have to do all these things, but that doesn't
15 mean that there are other changes you can't make.

16 And, also, (e) (1) works quite well as a way of
17 saying: And, look, you employees, you can't say in the
18 interim between us signing this agreement and the closing
19 that we're not allowed to change our benefits package.

20 If Twitter had said two days before the
21 closing, we are changing our severance, they could have
22 done so. They didn't. And so now they're locked into
23 that for these employees.

24 **THE COURT:** Okay. Thank you.

25 **MR. COHEN:** Thank you.

1 **THE COURT:** Counsel, I don't want to talk
2 anymore about the third-party beneficiary. Let's just
3 talk about what we should do here with piercing the veil.

4 **MR. WALLACE:** I understand. One point of
5 clarification, if I might, before then on the fraud piece.

6 My colleague said that we didn't move to
7 dismiss the fraud claim as to X Holdings. That's
8 inaccurate because as the defendant's named, it's X Corp.
9 FKA Twitter, Inc. FKA all of the entities, we moved on
10 behalf of all of the entities to dismiss, particular
11 claims, including fraud. So I don't think that
12 representation was correct.

13 As to veil piercing, as Your Honor noted, the
14 allegations in the complaint are sparse in terms of
15 putting us on notice as to what they're actually intending
16 to allege. Nevertheless --

17 **THE COURT:** Let's start with the forfeiture.

18 **MR. WALLACE:** Sure.

19 **THE COURT:** I mean, I think, generally,
20 Judge Burke is right, that a footnote is not enough to
21 preserve the argument. But I do understand why your
22 argument is the allegations here are sparse. And you
23 didn't present a more fulsome motion to dismiss all of
24 that.

25 Do you know if I set a review on that, is it

1 abuse of discretion?

2 **MR. WALLACE:** Your Honor, I need to look closer
3 at it, but I think, in looking at the authority that's
4 been cited to date, I think it's less than clear on that
5 point.

6 **THE COURT:** I mean, because -- you know,
7 obviously you heard me today. I don't, you know, pull any
8 punches. You know what I'm thinking. If it's abuse of
9 discretion, then he's going to get affirmed because I
10 can't come close to finding abuse of discretion on
11 forfeiture.

12 If I look at it again, I think what I'm going
13 to do is what I just suggested, which is give them another
14 opportunity to respond to your reply, and then you can
15 have the final surreply on that, since it's your motion to
16 dismiss. And include in that stuff about the standard of
17 review for me to dismiss.

18 But if you think it's clear, if you go back
19 that it's abuse of discretion, don't waste my time because
20 I think he was clearly within his rights to find
21 forfeiture here.

22 **MR. WALLACE:** Understood, Your Honor.

23 **THE COURT:** Do you want to address the merits
24 of the veil piercing? I know that's where you were
25 getting to first, what you think are conclusory

1 allegations.

2 **MR. WALLACE:** Right.

3 As you were noting, veil piercing is an extreme
4 remedy only applied in exceptional circumstances. There's
5 a strong presumption against disregarding the corporate
6 form and, as a result, conclusory allegations concerning
7 veil piercing aren't adequate.

8 Here, the allegation -- I mean, it's continual
9 practice of taking kind of facts that are in the ether,
10 and acting like they were in the complaint that just
11 aren't there.

12 They are a number of allegations regarding
13 Mr. Musk's content moderation, or alleged content
14 moderation on the platform. There's a couple conclusory
15 allegations -- or one conclusory allegation concerning
16 Mr. Musk allegedly having employees from another entity do
17 some work for a some limited amount of time for Twitter.
18 Again, not clear veil piercing-type conduct.

19 To prove veil piercing or to plead veil
20 piercing, you must show a unity of interest, where Musk
21 and Twitter cease to be separate entities.

22 They haven't even gotten close to that in their
23 pleadings, even if it was assumed true. And that unity of
24 interest -- I think it's interesting the case law talks
25 about it in two terms, two ways.

1 One is you have unity of interest in what
2 you're doing in a macro level, you're controlling the
3 company in a macro -- but you're also controlling its
4 day-to-day operation. You're, essentially, running every
5 aspect of the company.

6 As Mr. Cohen alluded to, Mr. Musk is a busy
7 man. I don't think he's there day-to-day. There's no
8 allegation he was there day to day running the company in
9 ever aspect of the company, such as an adequate community
10 of interest plan that exists otherwise to plead this
11 claim.

12 It must be pervasive control. Doesn't exist.
13 Wasn't pled.

14 The undercapitalization issue, the cases go
15 both ways on that issue, but the cases on which Mr. Cohen
16 relies, and the cases that find that undercapitalization
17 are, you know, a factor -- or dispositive factor are kind
18 of small, closely-held companies where these people aren't
19 going to get paid and there's a judgment against them.

20 Some courts find that's still not enough to
21 prove the requisite injustice that's attended to establish
22 a claim.

23 Here's, there no allegations of any kind of
24 imminent injustice that's going to result if there's a
25 judgment against Twitter in this case. Therefore, I think

1 it's just failed to plead veil piercing adequately.

2 **THE COURT:** Okay. As I am sitting here, I
3 think maybe the easiest way to deal with this standard of
4 review issue because it might obviate the need for other
5 stuff, and since I'm unclear on it, I hate to keep
6 imposing additional briefing.

7 Can you give me letter briefs within -- how
8 many days do you want? Is two weeks long enough -- about
9 the standard of review for my review of this specific
10 decision and your best argument on whether I have --
11 whether it's de novo for me or whether I do have to defer
12 to Judge Burke because I think that will make it a lot
13 simpler.

14 And if it's de novo, I am likely going to order
15 the supplemental briefing that I suggested on the actual
16 merits. And if it's abuse of discretion, then I will
17 probably adopt his R&R on that point.

18 **MR. WALLACE:** Understood, Your Honor.

19 Is there -- you know, this issue was raised
20 unilaterally by Judge Burke. It wasn't raised by the
21 plaintiff.

22 **THE COURT:** You can address all that in your
23 letter brief. I should give you a page limit. I will be
24 generous, five. No more than five single-spaced pages on
25 this.

1 And so, yes, if you think it makes a difference
2 that he raised forfeiture sua sponte versus they raised
3 it, to what my standard of review it is.

4 But I want to know whether I have to defer or
5 not. It's that simple. And you know my views either way.
6 I defer -- if I find it's abuse of discretion, I'm going
7 to defer. If it's not, then I'm going to adopt the
8 briefing and postpone the merits decision on the 12(b) (6)
9 until I get that.

10 **MR. WALLACE:** Understood.

11 **THE COURT:** Okay. Anything else?

12 Since I have you all here, is there anything,
13 either in Arnold or Cornet, that should be kind of on my
14 radar that I should be looking at?

15 I know you have discovery stuff coming up. Is
16 there stuff beyond that?

17 **MR. COHEN:** Yes, Your Honor. There are several
18 motions to quash pending in Arnold, some of which have
19 been outstanding for something on the order of
20 two-and-a-half years. So we would love a decision on
21 those or an argument on those.

22 **THE COURT:** Okay. I have not -- you know, I
23 took over this case very recently.

24 **MR. COHEN:** Yes.

25 **THE COURT:** I wasn't aware of those. Thank you

1 for bringing them to my attention. Maybe send in
2 something on the specific docket number, so I don't have
3 to search through the entire docket about what I need to
4 decide.

5 **MR. COHEN:** 100 percent.

6 **THE COURT:** Okay.

7 Anything else?

8 **MR. WALLACE:** Nothing further from our
9 perspective.

10 **MR. MANEWITH:** With respect to Cornet,
11 obviously, the motion has been pending. Other than that,
12 there's nothing.

13 **THE COURT:** It's all -- I mean, the issues at
14 least as to yours are largely overlapping with the first
15 R&R, so it's all going to come out about the same time.

16 **MR. COHEN:** And it's not Arnold or Cornet, but
17 the Woodfield motion has been pending for quite some time
18 as well on the arbitration, motion to compel arbitration.

19 **THE COURT:** Okay.

20 I just got that one, too. I'll take a look at
21 it. At least in my world, I just got it. I don't know if
22 that's a quick time or not in this world.

23 **MR. COHEN:** We appreciate it.

24 **THE COURT:** Okay.

25 **MR. COHEN:** I'm not going to speak for

1 Mr. Wallace --

2 **THE COURT:** Oh, five pages. Two weeks. So I
3 don't know when two weeks from today is, but two weeks
4 from today.

5 **MR. COHEN:** Yes.

6 **THE COURT:** Okay? We'll get an order on the
7 docket to clarify. But thank you.

8 **MR. WALLACE:** Thank you, Your Honor.

9 **MR. COHEN:** Thank you, Your Honor.

10 (The proceedings concluded at 3:05 p.m.)

11

12

13 CERTIFICATE OF COURT REPORTER

14

15 I hereby certify that the foregoing is a true and
16 accurate transcript from my stenographic notes in the
17 proceeding.

18 /s/ Bonnie R. Archer
19 Bonnie R. Archer, RPR, FCRR
20 Official Court Reporter
21 U.S. District Court

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